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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. _____

ANTHONY J. RUSCITO, JACQUELYN TOMASSI and ROBERT K. DUBROFF,

Petitioners,

-v.-

GLORIA SCHAFFER, SECRETARY OF THE STATE OF CONNECTICUT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Anthony J. Ruscito, Jacquelyn Tomassi and Robert K. Dubroff, pray that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Second Circuit affirming the judgment of the United States District Court for the District of Connecticut which dismissed petitioners' complaint on the grounds it presented a non-justiciable controversy.

OPINIONS BELOW

The opinion of the United States District Court is printed as Appendix A to this petition. The decision of the United States Court of Appeals for the Second Circuit is printed as Appendix B to this petition. It is believed neither decision is reported.

JURISDICTION

The effective date of the judgment of the United States Court of Appeals for the Second Circuit is January 4, 1971. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners maintain the judgment of the court below denies them the right to petition their government through the election process. By restricting the ability to place questions on the official ballot to legislature (Conn. Statutes Sec. 9-369), Connecticut unreasonably burdens the right of individuals to associate for the advancement of political beliefs.

Petitioners rely upon the First, Fifth and Fourteenth Amendments to the Constitution of the United States; Title 28 U.S.C. Sections 1343(3) and (4); 2201, 2202, 2281 and 2284; Title 42 U.S.C. 1983.

QUESTIONS PRESENTED

(a) Do the federally protected rights (the right of individuals to associate for the advancement of political beliefs and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively), asserted in Williams v. Rhodes, 393 U.S. 23 (1968), govern the states' election processes generally, or are they limited to the selection of presidential electors?

(b) Must a state provide a minimal elective framework within which diverse political groups can compete? If so, does that minimal framework include the right to put a question on the ballot by petition, when that minimal framework includes the right to place an independent presidential candidate on the ballot by petition?

(c) Are the foregoing questions so insubstantial as to defeat federal jurisdiction?

(d) Can a single district judge dismiss a complaint seeking to convene a three judge court upon his finding the question presented is "non-justiciable"?

STATEMENT OF THE CASE

Three Connecticut voters sought to place a question (as opposed to an independent candidate) on the official state ballot by petition. They contend the right of individuals to associate for the advancement of political beliefs asserted in Williams v. Rhodes, 393 U.S. 23 (1968) requires the state permit reasonable access to the ballot not only to independent presidential candidacies but also to single issue groups.

They requested the Secretary of State provide them with official petition forms to obtain the same number of voter signatures to sponsor their question as are needed to sponsor an independent statewide candidacy. (Conn. Statutes Sec. 9-453, 454) Upon the Secretary's refusal to provide official forms of petition, they brought this action.

The District Court dismissed the action as "non justiciable". The Court of Appeals affirmed, holding Williams applied only to the selection of presidential electors.

Jurisdiction vs. Justiciability

It is always disheartening for a lawyer to attempt to frame pleadings artistically, to labor over language only to have the court ignore the issue presented and decide a different case.

The fourth paragraph of petitioners' demand for relief reads:

"(d) That the court order the Secretary of the State for the State of Connecticut to provide sufficient legal petitions to permit the plaintiffs to attempt to place a question on the ballot in the general election November 1970, and further, if the plaintiffs obtain sufficient signatures* that the court order the defendant to place the question contained in said petitions on the ballot in the next general election to be held November 3, 1970." (emphasis added)

The District Court recognized this claim when it stated:

"The three plaintiffs represent that they are citizens of the United States and all are Connecticut voters. They allege that they have requested the defendant Secretary of State to send them the official petition forms entitling them to have placed on all voting machines in the next state election on November 3, 1970 the following question:

'The United States, unilaterally, should immediately withdraw all of its forces from Southeast Asia, South Vietnam, Laos, Cambodia and Thailand, whether or not a negotiated settlement is reached.'"

---

*Plaintiffs intended to obtain the same number of signatures needed for an independent statewide candidacy. Conn. Statutes Sec.9-453, 454

After reviewing petitioners' claims, the District Court concluded:

> "....The court finds that the complaint presents a non-justiciable political question and is accordingly dismissed."
>
> (Appendix A, p.2a)

The Second Circuit described petitioners' claim as

> "Appeal from dismissal in the United States District Court for the District of Connecticut, T. Emmet Clarie, Judge, of action seeking to force Secretary of the State to place question on voting machines." (emphasis added)
>
> (Appendix B, p.7a)

The appeals court then stated:

> "The (district) court found no substantial constitutional question raised, declined to convene a three-judge court, and dismissed the action for lack of jurisdiction. ....."
>
> (Appendix B, p.8a)

While the English language is ambiguous at best, a reading of the District Court's opinion reveals no finding of insubstantiality. The District Court did say:

"...The separation of power among the three separate magistracies of constitutional government will not permit this court to substitute its judgment for the deliberations of the state legislature."

(Appendix A, p.4a)

Non-justiciability infers both jurisdiction and a substantial claim. Had either court found the claim frivolous or insubstantial, it should have found for the defendant on the merits. Baker v. Carr, 369 U.S. 186, 200 (1962); Bell v. Hood, 327 U.S. 678, 682 (1945); Binderup v. Pathe Exchange, 263 U.S. 291, 305 (1923). Whether a complaint states a cause of action is a question of law to be decided after not before the court has assumed jurisdiction over the controversy.

Under the criteria enumerated in Baker (p.226), the petitioners' claim is justiciable:

1) The question is one of the consistency of state action or non-action with the federal constitution.

2) The question is not one which is decided or to be decided by a branch of government co-equal with this court.

3) The court, by deciding this case, does not risk embarrassment of our government abroad or grave disturbance at home.

4) The court need not enter upon a policy determination for which judicially manageable standards are lacking.

The cases following Baker applied federal standards of fairness to state voting standards. Gray v. Sanders, 372 U.S. 368 (1962); Wesberry v. Sanders, 376 U.S. 1 (1963); Reynolds v. Sims, 377 U.S. 533 (1964); Sailors v. Board of Education, 387 U.S. 105 (1967); Avery v. Midland County, 390 U.S. 474 (1968); Moore v. Ogilvie, 394 U.S. 814 (1969); Hadley v. Junior College Dist., 90 Sup. Ct., 791; 25 L.Ed.2d 45 (1970).

The justiciability of federal constitutional controversies involving state election procedures is so settled, Ohio's assertion of non-justiciability in Williams, was summarily dismissed by this court.

> "Ohio's claim that the political question doctrine precludes judicial consideration of these cases requires very little discussion. That claim has been rejected in cases of this kind numerous times. It was rejected by the court unanimously in 1892 in the case of McPherson v. Blacker, 146 U.S. 1, 23-24, and more recently it has been squarely rejected in Baker v. Carr, 369 U.S. 186, 208-237 (1962), and in Wesberry v. Sanders, 376 U.S. 1, 5-7 (1964). Other cases to the same effect need not now be cited. These cases do raise a justiciable controversy under the Constitution and cannot be relegated to the political arena."

Williams v. Rhodes, 393 U.S. 23, 28 (1968)

The reach of Williams v. Rhodes

Petitioners rely entirely upon the decision of this court in Williams v. Rhodes, supra. They contend Williams, with its enumeration of "....two different although overlapping, kinds of rights - the right of individuals to associate for the advancement of political beliefs and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively..." upholds a minimal federal constitutional standard for state election processes.

Both lower courts limited Williams to the election of presidential electors. The District Court held:

> "....Williams is distinguishable from this case in that there the Supreme Court held that state laws enacted pursuant to the command of Art. II Sec. 1 of the Federal Constitution to regulate the selection of presidential electors must meet the requirements of the equal protection clause once they are enacted. ....."
>
> (Appendix A, p.5a)

The appeal court's construction was yet narrower:

> "Plaintiffs attempt to bring this case within the rule of Williams v.

"Rhodes, 393 U.S. 23 (1968) holding that state laws regulating the selection of electors must meet the requirements of the Equal Protection Clause. They fail, however, to demonstrate any relationship between the right of voters not to be unduly restricted in their choice of candidates for office and the expression of opinion sought here, authorized by no state or federal statute or constitutional provision. They have been unable to identify any federal constitutional right denied them here."

(Appendix B, p.9a)

What is the reach of Williams? Do its important freedoms apply only to the election of presidential electors or must a state provide access to the ballot of an independent candidate for governor or alderman? Do we have one standard of fairness for federal elections and another for state, or is the freedom to associate available to every citizen at all the myriad levels of government?

The appeals court also perceived no connection between choice of candidates and expression of citizen opinion, a simplistic attitude in a complicated age. There is no such thing as a one issue candidate, and because of this political campaigning is customarily abstract with no discussion about specific techniques for implementing office-seeking generalities. Limiting ac-

cess to the election process to independent candidates restricts the officeholder's responsibility to those who actually voted for him. To say the quality of representation would not be improved by a valid expression of public opinion through the election process is to ignore reality.

The appeals court saw no relationship between the right of voters not to be restricted in their choice of voters and the expression of opinion sought by these petitioners. It did not indicate the relationship sought. If a judge does not understand many governmental decisions are made by bureaucrats accountable to no one but their superiors, if he ignores the tumult in the courthouse lobby, then no adequate demonstration can be made to those who will not see.

The summary refusal to consider a citizen vote on specific issues may indicate the lower courts' reluctance to risk embarrassment of government agencies. What happens to Paris negotiators who play poker with men's lives, or the State Department experts willing to push on with the blood of other men's sons should their policies be repudiated at the polls? The possibility of disturbing bureaucrats should not deprive the citizen of his right to express himself in a meaningful fashion.

The appeals court found no federal constitutional right violated, though the petitioners relied on the right to petition the government (one of the most important

freedoms), as well as the time honored ambiguities of due process and equal protection. If the court expects petitioners to point to specific constitutional language, they place an insurmountable burden upon all efforts to modify or create constitutional rights to accommodate social change. Strict construction, in this sense, ignores the fact change in constitutional standards has been the obligation of the courts from the very beginning. Federal supremacy was not an article of the constitution until Chief Justice Marshall said it was. The protection of independent presidential candidacies was not a responsibility of the states until this court said it was.

To hold that Williams applies only to presidential candidates and does not encompass either non-presidential candidates or access to the ballot by single issue groups through the same petitionary process, is to place unnecessary and wrong limitations on the expansion of political freedom inherent in that opinion.

On a practical philosophy of constitutional interpretation:

The arguments between those who believe courts must take positive action to correct social wrongs and those who believe courts exist to preserve the status quo has developed into a quarrel between what is called a strict or a loose construction of the constitution. Propriety lies between these

extremes. There are occasions when a judicial change of constitutional standards is required simply because the "people" have no remedy in the other branches of government. The obligation of this court to make new law and new policy under those circumstances was stated with commendable candor by Justice White when he wrote:

> "That the Court's holding today is neither compelled nor even strongly suggested by the language of the Fifth Amendment, is at odds with American and English legal history, and involves a departure from a long line of precedent does not prove either that the Court has exceeded its powers or that the Court is wrong or unwise in its present reinterpretation of the Fifth Amendment. It does, however, underscore the obvious - that the Court has not discovered or found the law in making today's decision, nor has it derived it from some irrefutable sources; what it has done is to make new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution. This is what the Court historically has done. Indeed, it is what it must do and will continue to do until and unless there is some fundamental change in the constitutional distribution of governmental powers."(emphasis added)

Miranda v. Arizona, 384 U.S. 436,531 (1966)

If a judge sees himself as interpreter of law created by others, he must refuse to create "new public policy" because this encroaches upon territory his philosophy allots elsewhere. Should he take a longer perspective, he will see history's fond remembrance is reserved for judges who encourage the painless arrival of the future.* Discount the blurring effect of time and you cannot minimize the courage of Marshall, whose implementation of his vision of a great single nation may have inspired some Tories to paint "Impeach John Marshall" on their buggies. History smiles on his memory because his vision was sound and he had the courage of his vision. Chief Justice Taney, in Dred Scott v. Sandford, 60 U.S. 393 (1856), may have seen himself as courageous, bucking the abolitionist tide, but his vision was askew. He foresaw no desegregation decision when he destroyed the Missouri Compromise.

An analysis of history's reaction to Marshall and Taney provides practical criteria for the exercise of this court's power to change constitutional standards:

(1) Is relief available in another branch of the government? Is there an adequate, or any, non-judicial remedy?

---

*"...judges must exercise, in the examination of the subject, that understanding which Providence has bestowed upon them, with that independence which the people of the United States expect from this department of the government..." John Marshall in Gibbons v. Ogden, 9 Wheat 1, 6 L.Ed23 (1824) at p. 68

(2) Are there compelling reasons for the change in constitutional standards, a moral or political vacuum urgently in need of filling?

(3) Is the constitutional end product historically sound? Will it encourage us towards the society our children will have? This involves prophecy, always an uncertain business, but history appears to support the Jeffersonian point of view, that the "common" people can be trusted to be free. Decisions which encourage individual liberties and permit general participation in the public processes, as a matter of historical probability, will most likely be vindicated by the future.

(4) Will the change in constitutional standards upset traditional power relationships to the extent the prestige of this court can be damaged? In other words, can you get away with it?

This consideration is the most important, and though not found in reported decisions, is the basis for the doctrine of non justiciability. This court makes decisions, but relies on others to enforce them. Often, those others are the people whose personal power the court's decision seeks to curb. What if the court held the Vietnam War unconstitutional and the president refused to stop? What if Illinois was ordered to reapportion and did not? These questions illustrate that the court in changing constitutional standards must rely on the

ultimate repository of political power, the people. When a judicial decision circumscribes an individual's or group's political or social power in favor of another individual or group, that transfer must meet with the approval of a substantial segment of the public. The judicial hold on public opinion has been strengthened by the advent of television. Traditional politicians are reluctant to oppose a court decision which meets with wide, if not unanimous, popular approval. Thus, though party politicians regretted Williams and the loosening of the two party hold on political power, not one could oppose a decision so clearly in the American tradition, so opposed to "boss" rule.

(5) Is the change of constitutional standards prospective? Cases creating a problem of retroactive application should be avoided.

Under this practical philosophy the Supreme Court operates as a social safety valve, a forum where tensions find relief when coordinate branches of government cannot or will not satisfy immediate political needs. The founding fathers realized men who occupy positions of power are psychologically incapable of yielding that power. The reasons are unconscious and complicated but they explain the undemocratic conditions in Baker persisting from 1901 despite constitutional provisions to the contrary. One cannot reasonably expect

a legislator to reapportion himself out of office any more than the average state judiciary can be expected to take an active role in correcting local political abuses.

Unfortunately, change is not without its critics. There are those, usually those whose personal power is endangered by change, who see social rearrangement as dangerous, unleashing forces held in check by former constitutional interpretations. Thus, this court is blamed for the increase in crime as though criminals have been enticed to a life of crime because illegally obtained evidence can no longer be used against them.

The silence greeting this court's entry into the "political thicket" indicates a popular acceptance of the role of the court as protector of the Jeffersonian tradition. Decisions which broaden general participation in public concerns replenish the well springs of our freedom and assure this nation's continued greatness.

THE LOWER COURTS ERRED IN FAILING TO CONVENE A THREE JUDGE COURT

The history and interpretation of the statutory language which authorized three-judge courts supports the assertion the practical aspect of judicial decision is more important than the legal. The original three-judge statute (28 U.S.C. 2281) was inspired by ex parte Young, 209 U.S.

123 (1908), which permitted federal restraint of state legislation. It is more than coincidental the section extending the three-judge concept to federal legislation (28 U.S.C. 2282) came twenty-seven years later, also inspired by political turmoil, the repeal of New Deal legislation by the federal courts. Because the claim for a three-judge court is connected with the expansion of constitutional rights, the decided cases are not without inconsistencies. Green v. Board of Elections, 380 F2d 445, 448 (2nd Cir. 1967).

There is one thread. The sole ground for dismissal of three-judge claim by a single judge is obvious lack of merit, a category that does not yet include political non-justiciability.* Schneider v. Rusk, 372 U.S. 224 (1963); Ex Parte Poresky, 290 U.S. 30 (1933); Kramer v. Union Free School Dist No. 15, 379 F.2d 491 (2nd Cir. 1967); Reed Enterprises v. Corcoran, 354 F.2d 519 (1965 D.C.); Hobson v. Hansen, 252 F.Supp. 4 (D.D.C. 1966).

The District Judge, acting alone, was without power to dismiss petitioners' complaint.

---

*"The lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject." California Water Service Co. v. City of Redding, 304 U.S. 252 (1938)

Why the writ should be granted:

The courtroom of the Second Circuit is on the seventeenth floor of the courthouse on Foley Square. Silent and elegant, it is somehow removed from the security guards in the lobby who demand identification from all entrants and search all briefcases. It is peaceful and if a judge is not careful, he may come to believe the calmness and order of his days reflects a calm and ordered society. He has but to enter his building through the front door to realize calmness and deliberation have all but deserted our political dialogue.

We are agonized because of the ambiguity of the political process. In 1964 Lyndon Johnson was a "peace" candidate, who would not send Americans to fight Asian battles. The rest is history: rallies, if you are for us, turn on your headlights; then petitions - finally, bombs and bloodied draft cards. Furor, hubub, sound - fury - signifying nothing but an increasing level of frustration and violence.

The petitioners' proposal may not solve every social problem, but it would return the furor over the war and other social issues to the voting process. Should petitioners succeed, cooperating citizens' groups could place the identical question on every ballot in the nation, ironically following in George Wallace's footsteps.

More importantly, the result, a valid vote, would be the most effective petitioning process yet devised.

The District Judge believed present techniques for petitioning the government are adequate.

> "...They (the petitioners) have a 'fundamental right' to petition their government and adequate political avenues remain open to them ....."
>
> (Appendix A, p.5a)

Obviously, the judge has not participated in vigils, signed petitions, or taken the traditional steps to make "governmental acts" consistent with popular desires. That these traditional activities have not accomplished a change in public policy, does not mean a majority of citizens are satisfied with present public policies. It means elective politics yields no answers; it means "government" has become disconnected from a people growing increasingly restless. Now is no time to take refuge in fictions.

If we take refuge at all, let it be in our heritage, in our faith in the voice of the people. Let us admit the white and black radicals who, with clenched fist, shout "Power to the People", are but following the American tradition and echoing the likes of Jefferson, Franklin and Paine.

In 1776 representative government was a revolutionary step away from monarchy. Today the "people" want a greater voice in their government. Eventually they shall have it. The petitioners' suggestion of a more effective method of petitioning their representatives is an evolutionary change towards the day when electronic referenda may be a daily occurrence. Petitioners seek no legal effect of their vote, no binding determination, just a better way to advise elected representatives of the kind of representation the people expect.

CONCLUSION

For these reasons, then, this Court should - and petitioners respectfully request that it does - issue its writ of certiorari to review the judgment of the court below.

Respectfully submitted,

Edward F. Kunin
285 Golden Hill Street
Bridgeport, Connecticut

Counsel for Petitioners

Dated: January 27, 1971

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APPENDIX A

OPINION OF THE UNITED STATES DISTRICT COURT DISTRICT OF CONNECTICUT

Civil No. B-96

ANTHONY J. RUSCITO, JACQUELYN TOMASSI and ROBERT K. DUBROFF,

Plaintiffs,

vs.

ELLA T. GRASSO, SECRETARY OF THE STATE OF CONNECTICUT,

Defendant.

RULING ON PLAINTIFFS' MOTION FOR THE APPOINTMENT OF A THREE-JUDGE DISTRICT COURT; AND DEFENDANT'S MOTION TO DISMISS

The three plaintiffs represent that they are citizens of the United States and all are Connecticut voters. They allege that they have requested the defendant Secretary of State to send them the official petition forms entitling them to have placed on all voting machines in the next state election

on November 3, 1970, the following question:

> "THE UNITED STATES, UNILATERALLY, SHOULD IMMEDIATELY WITHDRAW ALL OF ITS FORCES FROM SOUTHEAST ASIA, SOUTH VIETNAM, LAOS, CAMBODIA AND THAILAND, WHETHER OR NOT A NEGOTIATED SETTLEMENT IS REACHED."

The defendant has refused said request on the grounds that Connecticut law makes no provision in its statutes for such a statewide initiative or referendum. The plaintiffs request that a three-judge district court be convened for the purpose of enjoining the enforcement and operation of the Connecticut Election Laws, Conn. Gen. Stat., title 9, insofar as they fail to permit a citizen of said state to petition his government in this manner. The plaintiffs allege that to deny them this right would violate their first amendment rights to free speech and association, as well as the fundamental right of every citizen to petition his government; and it would serve to deny them equal protection of the laws and due process. In addition to responding to plaintiffs' motion, the defendant has moved to dismiss the complaint and the parties are in agreement that both motions may be properly considered at this time. The Court finds that the complaint presents a non-justiciable political question and is accordingly dismissed.

The Supreme Court in Baker v. Carr, 369 U.S. 186, 217 (1962), summarized the political question doctrine as follows:

"It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

"Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence. The doctrine of which we treat is one of

> " 'political questions', not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing."

The issue presented clearly falls within the prohibited political question area hereinbefore referred to. Whether or not Connecticut, as a matter of policy, should establish a procedure which would allow a public opinion question such as the one involved here to be placed on the voting machine is a matter solely for the Connecticut Legislature. It is within its power to initiate those policy decisions which are necessary if such procedures are found to be desirable. Should it decide this question affirmatively, it then becomes the prerogative of that body to establish workable standards and procedures for such referendums. The separation of power among the three separate magistracies of constitutional government will not permit this Court to substitute its judgment for the deliberations of the state legislature.

Nothing in the challenged statutes violates the plaintiffs' right to freedom of

speech and association; neither does it deny them due process of law. They presently have a "fundamental right" to petition their government and adequate political avenues remain open to them. Their equal protection argument represents that the constitution presently allows political candidates not backed by either major political party to place their names on the ballot for President of the United States, but the challenged statutes do not permit citizens to place issues of overwhelming public importance on the ballot by the same method. In making this argument, plaintiffs rely on Williams v. Rhodes, 393 U.S. 23 (1968). Williams is distinguishable from this case in that there the Supreme Court held that state laws enacted pursuant to the command of Art. II, § 1 of the Federal Constitution to regulate the selection of presidential electors must meet the requirements of the equal protection clause once they are enacted. No similar constitutional command is present here. The plaintiffs' proposed referendum merely seeks an advisory public opinion poll from the voters of the state, on an issue involving foreign affairs over which the state government has no constitutional authority or control. There is non-existent here the same strong considerations warranting constitutional protection, as is the right to support the presidential candidate of one's choice. The Court further notes that the 1965 Connecticut Consti-

tutional Convention considered a provision which would have enabled initiative and referendum procedures, as applied to legislation (Constitutional Convention Resolution No. 154) and it was rejected.

The action is dismissed for want of jurisdiction.

SO ORDERED.

Dated at Hartford, Connecticut, this 13th day of July, 1970.

T. Emmet Clarie
United States District Judge

APPENDIX B

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 263 - September Term, 1970
(Argued December 2, 1970 Decided January 4, 1971)

Docket No. 35305

ANTHONY J. RUSCITO, JACQUELYN TOMASSI, ROBERT K. DUBROPF,

Appellants,

-v.-

ELLA T. GRASSO, SECRETARY OF THE STATE OF CONNECTICUT,

Appellee.

Before: Friendly, Smith and Anderson, Circuit Judges.

Appeal from dismissal in the United States District Court for the District of Connecticut, T. Emmet Clarie, Judge, of action seeking to force Secretary of the State to place question on voting machines. Affirmed.

Edward F. Kunin, Bridgeport, Conn., for Appellants.

Barney Lapp, Assistant Attorney General (Robert K. Killian, Attorney General of the State of Connecticut, Daniel R. Schaefer, Assistant Attorney General, of counsel), for Appellee

Appendix B

PER CURIAM:

The three plaintiffs in this case, Connecticut citizens and voters, requested the defendant Secretary of the State to permit them to place on all voting machines in the next state election (since passed - November 3) the following question:

> The United States, unilaterally, should immediately withdraw all of its forces from Southeast Asia, South Vietnam, Laos, Cambodia and Thailand, whether or not a negotiated settlement is reached.

Since Connecticut law makes no provision in its election statutes for such a statewide initiative or referendum, the defendant refused the request. Plaintiffs sued in the District Court for the District of Connecticut (T. Emmet Clarie, Judge), requesting that a three-judge court be convened for the purpose of enjoining the "enforcement" of the Connecticut election laws, insofar as they fail to permit the holding of such advisory initiative measures.

The court found no substantial constitutional question raised, declined to convene a three-judge court, and dismissed the action for lack of jurisdiction. We affirm the judgment dismissing the action.

Plaintiffs attempt to bring this case within the rule of Williams v. Rhodes, 393 U.S. 23 (1968) holding that state laws regulating the selection of electors must meet the requirements of the Equal Protection Clause. They fail, however, to demonstrate any relationship between the right of voters not to be unduly restricted in their choice of candidates for office and the expression of opinion sought here, authorized by no state or federal statute or constitutional provision. They have been unable to identify any federal constitutional right denied them here. The court plainly lacked jurisdiction and a single judge had the power and duty to dismiss the action. Green v. Board of Elections of the City of New York, 380 F.2d 445 (2d Cir. 1967).

Judgment of dismissal affirmed.